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April 10, 2006

BY HAND

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings



Re: Request for Release of Waybill Data WB456-1

Dear Secretary Williams:

Union Pacific Railroad Company ("UP") hereby responds to the State of North Dakota's appeal from Director Leland L. Gardner's denial of the above-referenced request for the release of unmasked data from the STB's Costed Waybill Sample.

UP's contract revenue data are highly confidential and commercially sensitive. In order to protect these data, UP applies a proprietary masking procedure when filing Waybill Sample data with the Board. *See* 49 C.F.R. § 1244.3.

Board precedent clearly precludes the release of unmasked revenue data under the present circumstances. North Dakota told Director Gardner that it needs the data because it "is currently planning to bring a case under the Board's *Small Case Guidelines*."¹ The Board, however, has rejected suggestions that shippers should be afforded pre-complaint access to such data. *See Rate Guidelines, Non-Coal Proceedings*, 1 S.T.B. 1004, 1054 (1997). It has explained that "data from the Waybill Sample [are] not needed for the information that must be included in the initial complaint." *Id.* Director Gardner followed that precedent in rejecting North Dakota's request.²

¹ Letter from N. DiMichael & A. Goldstein to L. Gardner, dated Jan. 25, 2006, p. 2.

² Letter from L. Gardner to N. DiMichael & A. Goldstein, dated Mar. 10, 2006, pp. 1-2.

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North Dakota offers no reason to reverse Director Gardner's decision or to revisit the Board's decision in *Small Case Guidelines*. It argues that Director Gardner failed to consider "the restraints that are likely to apply to waybill data access once a complaint is filed" in light of the "procedural schedule favored by the Board in *BP Amoco*."³ However, Director Gardner properly applied the precedent established in *Small Case Guidelines*, and the Board should not reverse its policy of protecting against pre-complaint access to Waybill Sample data to address scheduling issues. The Board should address any scheduling issues by adjusting the procedural schedule – if North Dakota ever actually files a case and raises valid objections to the schedule.

Moreover, UP should be entitled to even more protection against pre-complaint access to its Waybill Sample data in this case than the generic railroad defendant addressed in *Small Case Guidelines*. First, North Dakota does not appear to be contemplating a case against UP (which does not even have any rail lines in that state). It apparently wants UP data in order to develop the "R/VCcomp" benchmark. As a non-party, UP should be entitled to even greater protection from disclosure of its confidential data than a party. Second, there is no way at this point in time to assess whether UP even has any traffic that would be relevant to the R/VCcomp benchmark. North Dakota has not even identified a rate that it intends to challenge, and if a case is ever filed, UP might be able to show that the requested data do not relate to comparable traffic. *See Small Case Guidelines*, 1 S.T.B. at 1036 (discussing "railroad-specific elements" that would affect the "R/VCcomp benchmark"). North Dakota should not be granted access to UP's highly confidential and commercially sensitive data as part of a general "fishing expedition." *Duke Energy Corp. v. Norfolk Southern Ry.*, STB Docket No. 42069 (STB served July 26, 2002) at 4. It should not be granted access to such data unless it makes a strong showing of relevance and need, and the appropriate balancing of these concerns can be addressed only in an actual case.

The Board has "a longstanding policy not to release the unmasked revenues or masking factors to parties in proceedings before the Board." *Duke Energy Corp. v. Norfolk Southern Ry.*, STB Docket No. 42069 (STB served Apr. 5, 2005) at 4. North Dakota provides no

³ Letter from N. DiMichael & A. Goldstein to Chairman Buttrey, dated Mar. 31, 2006, pp. 2-3.

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reason to reverse Director Gardner's decision applying that policy or to depart from that policy here, particularly in light of the Board's decision in *Small Rate Guidelines*.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal". The signature is fluid and cursive, with the first name "Michael" and last name "Rosenthal" clearly distinguishable.

Michael L. Rosenthal

*Attorney for Union Pacific
Railroad Company*

cc: Nicholas J. DiMichael
Andrew P. Goldstein